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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re E.G., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

E.G.,

Defendant and Appellant.

A152332

(Alameda County
Super. Ct. No. JV-02763401)

Appellant E.G. appeals from a disposition entered after the juvenile court found true allegations that he carried a concealed firearm, carried a loaded firearm while in a city, and gave false information to a peace officer. He contends the court erred in denying his motion to suppress. He also asks this court to independently review the sealed transcript relating to his motion made pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We affirm the court's denial of the suppression motion. However, we conclude the court's in camera *Pitchess* hearing did not conform with prescribed procedures, and on that basis, we conditionally reverse the judgment of conviction.

I. FACTS

Alameda County Sheriff Deputies Vincent Hall and Thomas Sterling were patrolling a high-crime area in Hayward at 12:30 a.m. on December 23, 2016, when they

noticed appellant riding a bicycle down a street against traffic and without lights, in violation of Vehicle Code sections 21650.1 and 21201, subdivision (d)(1), respectively. Appellant had his phone in his left hand, which was on the bicycle's handle bar. Deputy Hall noticed appellant kept his right hand over his jacket pocket while riding, which "was not a normal way to ride a bike." They told appellant to pull over and hop off his bike. Deputy Sterling took control of appellant's bike, while Deputy Hall asked appellant to stand near the sidewalk.

Deputy Hall noticed appellant's right hand was still over his jacket pocket after getting off his bicycle, so he asked, "What are you holding onto?" Deputy Hall tried to reach for appellant's right hand, but appellant turned away, slumped his body over, and put his arm around the front of his stomach as if trying to hide something around his waist. Moments later, Deputy Sterling attempted to control appellant from the left side, but appellant pulled away. Both deputies repeatedly told appellant to stop, relax, and put his hands behind his back. Deputy Hall secured appellant's right hand in a handcuff, while appellant continued to pull away. Meanwhile, appellant said he was "not trying to do anything," told the deputies they were hurting him, claimed his hand was broken, and replied that he was holding his phone. The deputies continued to tell appellant to stop moving and to put his hands behind his back. Appellant insisted he was "trying to put his stuff away." Deputy Hall told appellant they would hold onto his phone for him. Appellant did not comply with the deputies' orders.

Deputy Hall then saw appellant reach for "something." Having repeatedly told appellant to stop and let go of whatever he was holding, Deputy Hall used his body weight to knock appellant to the ground, grabbed him by the hair, and drove the appellant's face into the ground. Within seconds of appellant hitting the ground, Deputy Sterling noticed a gun had fallen out of appellant's clothing and said, "We got a gun . . . just popped out."

After the gun fell out of appellant's clothing, the officers hit him several times and ordered him to put his hands behind his back. Appellant pleaded for help and yelled in pain. The deputies continued to order appellant to put his hands behind his back as they

repeatedly struck him with their fists and knees for about 40 seconds. Appellant eventually complied, and Deputy Hall finished handcuffing appellant. During the struggle, the gun was lying on the ground a few feet away.

Appellant filed a motion to suppress the gun. The juvenile court heard testimony from Deputies Hall and Sterling and reviewed body-camera footage from both deputies. The court found that the deputies were credible and that their actions were justified by appellant's resistance to their efforts to gain control over him.

II. DISCUSSION

A. Motion to Suppress

Appellant alleges the court should have suppressed the firearm based on the deputies' excessive use of force. When reviewing a challenged search or seizure, we review the evidence in the light most favorable to the trial court's ruling. (*In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1236 (*Lennies H.*)). We uphold the court's factual findings if supported by substantial evidence (*People v. Siripongs* (1988) 45 Cal.3d 548, 566–567), but exercise our independent judgment when applying those facts to analyze reasonableness under the Constitution. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301.)

“[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.” (*Illinois v. Wardlow*, 528 U.S. 119, 123, citing *Terry v. Ohio* (1968) 392 U.S. 1, 30 (*Terry*); *People v. Celis* (2004) 33 Cal.4th 667, 674.) Such investigatory stops are often referred to as *Terry* stops and include traffic stops. (*People v. Hester* (2004) 119 Cal.App.4th 376, 386.)

The use of excessive force during a *Terry* stop violates the Fourth Amendment and is therefore analyzed under the Fourth Amendment's reasonableness standard. (*Graham v. Connor* (1989) 490 U.S. 386, 395–396 (*Graham*)). Factors relevant to assessing whether an officer's use of force was objectively reasonable include “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by

flight.” (*Id.* at p. 396.) “The ‘most important’ factor . . . is whether the suspect posed an ‘immediate threat to the safety of the officers or others.’ [Citation.] ‘A simple statement by an officer that he fears for his safety or the safety [of] others is not enough; there must be objective factors to justify such a concern.’ [Citation.]” (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 826.)

“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” (*Graham, supra*, 490 U.S. at p. 396, citing *Terry, supra*, 392 U.S. at pp. 20–22.) As the United States Supreme Court has recognized, a determination of reasonableness “must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary” (*Graham*, at pp. 396–397.) Appellate court decisions have consistently cautioned against judicial second-guessing of reasonable on-the-spot decisions made by experienced peace officers. (*People v. Wilson* (1997) 59 Cal.App.4th 1053, 1063 [“Appellate courts have repeatedly emphasized it is inappropriate for judges to second-guess on-the-spot decisions of officers in the field under these circumstances”].)

Turning to the matter at hand, we uphold the juvenile court’s factual findings that the deputies testified credibly and find that their testimony is supported by substantial evidence, including their body-worn cameras. (*Lennies H., supra*, 126 Cal.App.4th at p. 1236.) Appellant contends that we should reject the juvenile court’s credibility finding based on minor inconsistencies during testimony and small details missing from police reports about the incident. However, minor inconsistencies do not require us to reject otherwise credible testimony (CALCRIM No. 226), and we agree with the juvenile court’s finding that the officer’s body-worn cameras support their testimony.

Next, we analyze the deputies' use of force during the legal *Terry* stop of appellant under the *Graham* factors.¹ We agree that the crimes at issue were infractions of the Vehicle Code and therefore not serious. But appellant posed a potential risk because he was riding in an unusual manner (with his hand on his jacket pocket), turned his body away from the deputies, and attempted to keep his hand near his waist even after deputies ordered him repeatedly to put his hands behind his back. The stop also occurred late at night in a high-crime area, increasing the possible danger to the deputies. Finally, appellant was not complying with officer orders. Considered together, the potential risk to the deputies, appellant's suspicious behavior with respect to his hand on his jacket pocket, and his failure to comply outweigh the minor nature of the infractions.

Appellant complains the deputies should have attempted a pat search instead of taking him forcibly to the ground and hitting him repeatedly. Appellant is correct that, incident to a *Terry* stop, an officer may pat down the outside of a suspect's clothing solely to look for weapons "where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." (*Terry, supra*, 392 U.S. at 27.)² However, a pat down without force was infeasible because appellant failed to follow the deputies' instructions. Contrary to appellant's argument, his resistance and refusal to move his hand from his front pocket amounted to a furtive gesture and thereby escalated the situation. (Cf. *Florida v. J.L.* (2000) 529 U.S. 266, pp. 269–270; *People v. Fews* (2018) 27 Cal.App.5th 553, 560–561 [combination of odor of marijuana, high-crime area, furtive gestures, and uncooperative conduct justified search.] Deputy Hall thereafter knocked appellant to the ground because he believed it was an "emergency situation," requiring

¹ Appellant does not challenge the validity of the traffic stop. (*People v. Hester* (2004) 119 Cal.App.4th 376, 386.)

² As a threshold matter, a pat search of the front of defendant's pocket likely would have led the deputy to feel the gun concealed therein, which would in turn have resulted in its discovery. Accordingly, defendant's argument in favor of a pat search does not advance his effort to suppress the gun. (*People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1004.)

lawful “swift action to prevent imminent danger to life . . . or destruction of evidence.” (*People v. Ramey* (1976) 16 Cal.3d 263, 276.) When a deputy must overcome a defiant subject’s resistance to complete a pat down, deputies are permitted to use reasonable force, such as throwing a defendant to the ground. (*People v. Brown* (1985) 169 Cal.App.3d 159, 166).

In addition, appellant requests that we focus on the deputies’ use of force throughout the interaction, not just the force used until the gun fell out of defendant’s pocket and Deputy Sterling spotted it. We reject this argument because the deputies’ actions were reasonable at least until the point when the gun fell out of appellant’s pocket and Deputy Sterling saw it lying a few feet away from the scuffle. As the deputies’ use of force that resulted in exposure of the gun was lawful, we decline to address the prudence or legality of their conduct thereafter. Moreover, even if the force used after the gun was first spotted was excessive, that would not negate the lawfulness of the initial actions undertaken by the officers in this case. (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 899.) In sum, we reject appellant’s claim that the gun should be suppressed based on excessive force.³

B. *Pitchess* Review

Appellant filed a *Pitchess* motion, seeking disclosure of any police personnel records for the Deputies Hall and Sterling involving (1) any acts of aggressive behavior, violence or attempted violence, and/or excessive force or attempted excessive force; (2) any acts demonstrating bias based on race or gender; (3) acts involving illegal search and seizure; and (4) prior acts of fabrication and/or misstatement of facts. As explained further below, the court granted appellant’s *Pitchess* motion as to fabrication, but otherwise denied it. We first consider the denial of appellant’s request to review the deputies’ personnel files for prior instances of excessive force, the only specific category challenged on appeal.

³ Although we affirm the denial of his motion to suppress, E.G. may have other remedies to address the deputies’ alleged excessive use of force after the gun fell to the ground.

1. Denial of *Pitchess* Motion for Excessive Use of Force

During the *Pitchess* hearing to determine whether the court should review the deputies' personnel files for evidence of prior instances in which they used excessive force, the court asked defense counsel to explain relevance of the requested discovery. Noting that the threshold for discovery was low, defense counsel explained she would be seeking to suppress the firearm, and prior instances of excessive force would support her argument that excessive force was used in the instant case. Defense counsel also argued that prior instances of excessive force were potentially exculpatory. The court inquired whether there were any factual disputes about the force used. Defense counsel could not point to any such factual disputes. Accordingly, the court held that defense counsel had failed to make a showing sufficient to review the deputies' files for excessive force.

As courts are vested with broad discretion regarding *Pitchess* motions, we review a juvenile court's ruling denying such motions for abuse of discretion. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 992.)

"To initiate discovery, the defendant must file a motion supported by affidavits showing 'good cause for the discovery,' first by demonstrating the materiality of the information to the pending litigation, and second by 'stating upon reasonable belief' that the police agency has the records or information at issue. [Citation.]" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.) To establish good cause, the defense must present "a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Id.* at 1025.) A scenario sufficient to establish a plausible factual foundation "is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Id.* at p. 1026.) This two-part showing of good cause is a "relatively low threshold for discovery." (*Id.* at p. 1019.) If a defendant shows good cause, the court examines the material sought in camera to determine whether disclosure should be made and discloses "only that information falling within the statutorily defined standards of relevance." (*Ibid.*; *People v. Gaines* (2009) 46 Cal.4th 172, 179.)

Appellant claims the “reasonableness of the deputies’ use of force against [him] was central to [his] claim that the gun should be suppressed as the fruit of an illegal arrest.” While appellant may claim excessive force was used, the record shows defense counsel was unable to provide the necessary factual disagreement between the deputies and appellant at the *Pitchess* hearing. The court therefore denied appellant’s *Pitchess* motion as it related to excessive force. We agree with the court that because the interaction was recorded, and because defendant does not claim that the recording fails to accurately depict the events, past instances of excessive force were not relevant to appellant’s defense. Moreover, as we have already found reasonable the force used until Deputy Sterling saw the gun, this claim is moot.

2. Inadequate Appellate Record

As noted above, the court granted appellant’s *Pitchess* motion to review the deputies’ files for prior instances of fabrication. The court conducted an in camera review, during which it found no discoverable material within that category. Appellant asks that we conduct an independent review of the sealed transcript to determine if any police personnel records were improperly withheld. The Attorney General does not oppose the request but asks for an opportunity to brief whether information should have been turned over to the defense if a remand is ordered.⁴

Under well-established *Pitchess* procedure, a criminal defendant may bring a motion to discover law-enforcement personnel records relevant to a defendant’s defense. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225.) If the court finds the defendant has shown good cause for the discovery, the court must conduct an in camera hearing to determine if any relevant records must be produced. (*Id.* at p. 1226.) At the hearing, the custodian of records must bring to court all documents “ ‘potentially relevant’ ” to the defendant’s motion. (*Id.* at pp. 1228–1229.) The custodian of records is not required to

⁴ As discussed below, because conditional reversal is required for procedural errors, we make no determination whether any information should have been turned over to the defense. There is thus currently no need to provide an opportunity for further briefing.

bring an officer's entire personnel file, but if there is any doubt as to whether a document is relevant, he or she must present it to the court. (*Id.* at p. 1229.) The custodian also "should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the appellant's *Pitchess* motion." (*Ibid.*) The trial court must make a record of the documents it examined in ruling on the motion sufficient to permit appellate review. (*Ibid.*) The court may photocopy the documents and place them in a confidential file, prepare a list of the documents it considered, "or simply state for the record what documents it examined." (*Ibid.*) To protect privacy concerns, the hearing transcript and any documents copied for the record must be sealed. (*Ibid.*)

To assist with our review, we granted appellant's motion to request the Alameda County Superior Court to provide this court with all documents produced and reviewed by the juvenile court or, in the alternative, a list of the documents reviewed by the juvenile court during the sealed in camera hearing on the *Pitchess* motion. The Superior Court's clerk filed a certificate stating it had "no further documentation" from this sealed in camera hearing.

We have reviewed the transcript of the in camera proceedings and conclude that it is not sufficiently clear to allow for review of the juvenile court's decision. The custodian of records did not testify about her familiarity with the records or the specific files she reviewed for each officer. Though it appears she may have compiled complaints and internal-affairs investigations, summaries of those complaints and investigations and their results were not described nor provided to this court. Finally, it is not clear whether the court reviewed the actual complaints, a custodian's summary, or both. From the limited transcript, we cannot tell whether the custodian of records brought all potentially responsive documents, and whether the juvenile court reviewed the potentially responsive documents or merely a summary. As a result, we are unable to determine whether the juvenile court properly exercised its discretion in denying discovery.

III. DISPOSITION

The judgment is conditionally reversed. The case is remanded to the court with directions to hold a new in camera hearing on appellant's *Pitchess* motion in conformance with the procedures described in this opinion. The court shall make a proper record of the documents reviewed, by either retaining a copy of the documents or preparing a detailed description of the documents that will permit appellate review of all documents produced for inspection. If the court finds that discoverable documents were not produced, the documents shall be produced, and the court shall conduct further proceedings as necessary. If the court finds that all discoverable documents were produced or that no documents were discoverable, the court shall reinstate the judgment.

BROWN, J.

WE CONCUR:

POLLAK, P. J.

TUCHER, J.

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